
CASE NO. A-15-001001

IN THE NEBRASKA COURT OF APPEALS

ROSARIO BETANCOURT-GARCIA, Appellant

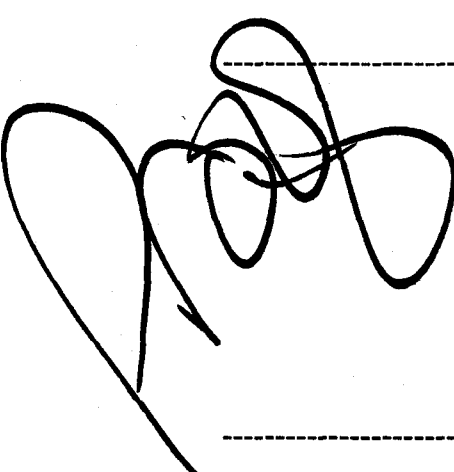
v.

THE STATE OF NEBRASKA, Appellee

FILED

APR 25 2016

NEBRASKA SUPREME COURT
COURT APPEALS



APPEAL FROM THE DISTRICT COURT OF
MADISON COUNTY, NEBRASKA
Case No. CR 13-197

Honorable Mark A. Johnson, District Judge

BRIEF OF APPELLANT

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STATEMENT OF THE BASIS OF JURISDICTON

In all cases, criminal or civil, and aggrieved party is entitled to one appeal to an appellate court or to the Supreme Court as may be provided by law. *Neb. Const.* art. I, § 23. This is an appeal from the Journal Entry dated October 26, 2015, filed in the District Court of Madison County, Nebraska, which Journal Entry constitutes a final order for the purposes of this appeal. *Neb. Rev. Stat.* §§ 25-1911–1912 (Reissue 2008).

The lower court entered its Journal Entry on October 26, 2015, sentencing the Defendant, Rosario Betancourt-Garcia (“Betancourt”) to a term of incarceration with the Nebraska Department of Corrections. (T202-204). Such Order constitutes a final order for purposes of this appeal. (T202-204). On October 26, 2015, Betancourt filed a Notice of Appeal, which was timely filed within thirty (30) days of the entry of the lower court’s order. (See Notice of Appeal in Court File). No docket fee was submitted for this appeal, but a Poverty Affidavit in Support of an Application to Proceed In Forma Pauperis was filed on October 26, 2015. (See Poverty Affidavit and Application to Proceed In Form Pauperis in Court File). The lower court granted Betancourt permission to proceed in forma pauperis on October 26, 2015. (See Order Granting In Forma Pauperis in Court File). No objection was interposed by anyone within thirty (30) days of Betancourt filing his in forma pauperis request on October 26, 2015, and no one has ever objected on grounds of fraudulent application as of the date of the filing of this Brief of Appellant.

STATEMENT OF THE CASE

A. Nature of the Case.

On November 17, 2003, the State of Nebraska (“the State”) filed a Complaint against Betancourt alleging in Count I, Kidnapping, a Class 1A felony, and in Count II, Use of a Firearm

to Commit a Felony, a Class 2 felony. (T2). On November 17, 2003, the lower court signed a warrant for Betancourt's arrest. (T6). On May 7, 2004, Betancourt was arrested in Collin County, Texas. (E2). On May 11, 2004, Betancourt signed a Waiver of Extradition Proceedings, voluntarily surrendering himself to the State of Nebraska. (E1; 1:547). On May 17, 2004, Betancourt's custody was transferred to the Immigration and Naturalization Services ("INS"), and he was, at a later date, subsequently deported. (79:10-80:22).

On July 1, 2013, Betancourt was again arrested in Collin County, Texas. On July 5, 2013, Betancourt again waived extradition and was extradited to the State of Nebraska on July 17, 2013. (T10; 81:7-81:18).

On August 21, 2013, the State filed an Information in the District Court of Madison County, Nebraska against Betancourt, charging him with Count I, Kidnapping, a Class IA felony and Count II, Use of a Firearm to Commit a Felony, a Class II felony. (T22). On August 23, 2013, the lower court arraigned Betancourt, and he entered pleas of not guilty to both counts. (T35-36).

On November 14, 2013, Betancourt filed a Motion for Absolute Discharge, which Motion was overruled by the lower court on December 13, 2013. (T38-39; T42-48). On May 21, 2014, the State filed an Amended Information against Betancourt, adding a third count, Count III, Conspiracy to Commit Kidnapping, a Class II felony. (T54). On May 21, 2014, Betancourt filed a Motion to Quash, which Motion was overruled by the lower court on September 19, 2014. (T60, T74-78).

This matter then proceeded to jury trial on August 10-12, 2015. (T192-193). The jury found Betancourt guilty on all three counts as alleged in the Amended Information. (T189-191).

B. The Issues Actually Tried in the Court Below.

The issues tried to the lower court were: (1) whether Betancourt was entitled to an order quashing the Amended Information filed on May 21, 2014 as the allegations contained therein were based upon events that occurred on November 15, 2003 (T60); (2) whether the State met its burden to prove that Betancourt was fleeing from justice for purposes of tolling the pertinent statute of limitations in order to overcome a directed verdict; and (3) whether the State proved beyond a reasonable doubt that Betancourt was guilty of Count I, Kidnapping, a Class IA felony, County II, Use of a Firearm to Commit a Felony, a Class II felony, and Count III, Conspiracy to Commit Kidnapping, a Class II felony. (T38-39; T60; T54).

C. How the Issues Were Decided.

The lower court ruled as follows: (1) on September 19, 2014, the lower court overruled Betancourt's Motion to Quash in its entirety (T74-78); (2) on August 11, 2015, the lower court overruled both of Betancourt's motions for directed verdicts (517:1-6; 585:23-586:7); and (3) on August 12, 2015, the jury found Betancourt guilty on all three counts alleged in the Amended Information. (T189-191).

On October 23, 2015, the lower court sentenced Betancourt as follows: on Count I, Kidnapping, a Class IA felony, to life imprisonment in an institution under the jurisdiction of the Nebraska Department of Corrections; on Count II, Use of a Firearm to Commit a Felony, a Class II felony, to an indeterminate term of not less than ten years nor more than 30 years; and on Count III, Conspiracy to Commit Kidnapping, a Class II felony, to an indeterminate term of not less than 30 years nor more than 50 years. (T202-203). The lower court further ordered that Counts I and III are to be served concurrent to one another, and Count II is to be served

consecutive to Counts I and III. (668:16-670:9) (T202-203). Betancourt was given credit for 828 days previously served. (T203).

D. Standard of Review on Appeal.

A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. Loyd*, 269 Neb. 762, 766, 696 N.W.2d 860 (2005) (citing *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004)).

Where the State fails to produce evidence sufficient to sustain a finding by the jury that the accused was fleeing from justice during the operating period of the statute of limitations, the trial court should direct a verdict of acquittal. *Emery v. State*, 138 Neb. 776, 295 N.W. 417 (1940). The burden of proof is upon the State under such circumstances to prove beyond a reasonable doubt that the defendant was fleeing from justice; otherwise, the statute of limitations is a complete defense. *Id.*

To state a claim of ineffectiveness of counsel as a violation of the Sixth Amendment to the Constitution of the United States and *Neb. Const.* art. I, §11 and thereby obtain a reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998) (citing *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997) and *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997)).

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the

properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support a conviction. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005) (citing *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004) and *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003)).

ASSIGNMENTS OF ERROR

- I. *The Lower Court Erred In Failing To Quash The Amended Information Filed On May 21, 2013 For The Reason That The Amended Information Showed On Its Face That The Three Year Statute Of Limitations Prescribed By Neb. Rev. Stat. § 29-110 Barred The State's Prosecution;*
- II. *The Lower Court Erred In Failing To Direct A Verdict Of Acquittal For The Reason That The State Failed To Adduce Sufficient Evidence To Sustain A Jury Verdict That Betancourt Was Fleeing From Justice To Toll The Statute of Limitations As Set Forth In Neb. Rev. Stat. § 29-110;*
- III. *At Trial, Betancourt Received Ineffective Assistance Of Counsel For The Reason That His Trial Counsel Dismissed His Appeal Of The Lower Court's Ruling On His Motion For Absolute Discharge, Thereby Waiving His Right To Challenge Counts I And II of the Complaint On Speedy Trial Grounds; and*
- IV. *The Lower Court Erred In Failing To Take Into Account Any Mitigating Factors In Sentencing Betancourt To Life Imprisonment On Count I, Kidnapping, A Class IA Felony, Rather Than To A Term Of Years.*

PROPOSITIONS OF LAW

I.

EXCEPT AS OTHERWISE PROVIDED BY LAW, NO PERSON SHALL BE PROSECUTED FOR ANY FELONY UNLESS THE INDICTMENT IS FOUND BY A GRAND JURY WITHIN THREE YEARS NEXT AFTER THE OFFENSE HAS BEEN DONE OR COMMITTED OR UNLESS A COMPLAINT FOR THE SAME IS FILED BEFORE THE MAGISTRATE WITHIN THREE YEARS NEXT AFTER THE OFFENSE HAS BEEN DONE OR COMMITTED AND A WARRANT FOR THE ARREST OF THE DEFENDANT HAS BEEN ISSUED.

Neb. Rev. Stat. § 29-110 (1) (Reissue 2010).

II.

AN INFORMATION MUST BE FILED WITHIN THE PERIOD DESIGNATED BY THE STATUTE OF LIMITATIONS OR A PROSECUTION FOR AN OFFENSE WITHIN ITS TERMS IS BARRED.

Jacox v. State, 154 Neb. 416, 48 N.W.2d 390 (1951).

III.

A STATUTE OF LIMITATIONS IS NOT JURISDICTIONAL, BUT IS, RATHER, AN AFFIRMATIVE DEFENSE.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

IV.

THE TIME LIMITATIONS PRESCRIBED IN THIS SECTION SHALL NOT EXTEND TO ANY PERSON FLEEING FROM JUSTICE.

Neb. Rev. Stat. § 29-110 (9) (Reissue 2010).

V.

IN *NEB. REV. STAT.* § 29-110 (Reissue 2010), THE PHRASE “FLEEING FROM JUSTICE” MEANS TO LEAVE ONE’S USUAL ABODE OR TO LEAVE THE JURISDICTION WHERE AN OFFENSE HAS BEEN COMMITTED, WITH INTENT TO AVOID DETECTION, PROSECUTION, OR PUNISHMENT FOR SOME PUBLIC OFFENSE.

State v. Thomas, 236 Neb. 84, 459 N.W.2d 204 (1990).

VI.

THE DEFENSE OF THE STATUTE OF LIMITATIONS IN A CRIMINAL CASE IS RAISED BY A DEFENDANT’S NOT GUILTY PLEA.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

State v. Nuss, 235 Neb. 107, 454 N.W.2d 482 (1990).

Jacox v. State, 154 Neb. 416, 48 N.W.2d 390 (1951).

Emery v. State, 138 Neb. 776, 295 N.W. 417 (1940).

VII.

THE GENERAL ISSUE IN A CRIMINAL CASE INTERPOSES THE DEFENSE OF THE STATUTE OF LIMITATIONS, AND THE BURDEN IS ON THE STATE TO PROVE ALL ESSENTIAL ELEMENTS OF THE CRIME CHARGED, INCLUDING THE FACT THAT THE CHARGES WERE FILED WITHIN THE PERIOD SPECIFIED BY THE APPLICABLE STATUTE OF LIMITATIONS.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

VIII.

IF THE STATUTE OF LIMITATIONS HAS EXPIRED BEFORE AN INFORMATION IS FILED BY THE STATE, A CONVICTION FOR THE OFFENSE ALLEGED IS NOT SUSTAINED BY THE EVIDENCE.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

IX.

CRIMINAL DEFENDANTS WHO WISH TO CHALLENGE THE SUFFICIENCY OF THE CHARGES AGAINST THEM DO SO BY FILING A PLEA IN ABATEMENT OR MOTION TO QUASH.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

X.

A DEFECT APPARENT ON THE FACE OF THE RECORD MAY PROPERLY BE REACHED BY A MOTION TO QUASH.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

XI.

A PRETRIAL PROCEEDING RAISING A STATUTE OF LIMITATIONS DEFENSE—A CHALLENGE TO THE SUFFICIENCY OF THE CHARGES—IS BROUGHT EITHER BY A MOTION TO QUASH OR A PLEA IN ABATEMENT, DEPENDING ON WHETHER OR NOT THE DEFENSE APPEARS ON THE FACE OF THE RECORD.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

XII.

AN ORDER OVERRULING A PLEA IN ABATEMENT OR MOTION TO QUASH IS NOT A FINAL, APPEALABLE ORDER.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

XIII.

THE OVERRULING OF A PRETRIAL MOTION RAISING A STATUTE OF LIMITATIONS NEITHER AFFECTS A SUBSTANTIAL RIGHT NOR OCCURS IN THE CONTEXT OF A SPECIAL PROCEEDING.

State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

XIV.

THE APPLICABLE STATUTES OF LIMITATION SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF THE DEFENDANT IN A CRIMINAL CASE.

Jacox v. State, 154 Neb. 416, 48 N.W.2d 390 (1951).

XV.

WHERE THE STATE FAILS TO PRODUCE EVIDENCE SUFFICIENT TO SUSTAIN A FINDING BY THE JURY THAT THE ACCUSED WAS FLEEING FROM JUSTICE DURING THE OPERATING PERIOD OF THE STATUTE OF LIMITATIONS, THE TRIAL COURT SHOULD DIRECT A VERDICT OF ACQUITTAL.

Emery v. State, 138 Neb. 776, 295 N.W. 417 (1940).

XVI.

THE TRIAL COURT SHOULD DIRECT A VERDICT IN A CRIMINAL CASE ONLY IF THERE IS A COMPLETE FAILURE OF EVIDENCE TO ESTABLISH AND ESSENTIAL ELEMENT OF THE CRIME CHARGED OR THE EVIDENCE IS SO DOUBTFUL IN CHARACTER AND LACKING PROBATIVE VALUE THAT A FINDING OF GUILT BASED UPON SUCH EVIDENCE CANNOT BE SUSTAINED.

State v. Thomas, 236 Neb. 84, 459 N.W.2d 204 (1990).

State v. Brown, 235 Neb. 374, 455 N.W.2d 547 (1990).

XVII.

THE BURDEN OF PROOF IS UPON THE STATE TO PROVE ALL THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED, INCLUDING THAT IT WAS COMMITTED BY WITHIN THE TIME FIXED BY LAW, OTHERWISE THE STATUTE OF LIMITATIONS IS A COMPLETE DEFENSE.

State v. Nuss, 235 Neb. 107, 454 N.W.2d 482 (1990).

Emery v. State, 138 Neb. 776, 295 N.W.417 (1940).

XVIII.

A VERDICT OF GUILTY IN A CRIMINAL CASE THAT IS CONTRARY TO THE EVIDENCE WILL NOT BE SUSTAINED.

Jacox v. State, 154 Neb. 416, 48 N.W.2d 390 (1951).

XVIX.

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION GUARANTEES EVERY CRIMINAL DEFENDANT THE RIGHT TO EFFECTIVE ASSSISTANCE OF COUNSEL.

State v. Becerra, 253 Neb. 653, 573 N.W.2d 397 (1998).

XX.

IN ORDER TO ESTABLISH A RIGHT TO POSTCONVICTION RELIEF BASED ON A CLAIM OF INEFFECTIVE ASSITANCE OF COUNSEL AT TRIAL OR ON DIRECT APPEAL, THE DEFENDANT HAS THE BURDEN FIRST TO SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT; THAT IS, COUNSEL'S PERFORMANCE DID NOT EQUAL THAT OF A LAWYER WITH ORDINARY TRAINING AND SKILL IN CRIMINAL LAW IN THE AREA. NEXT, THE DEFENDANT MUST SHOW THAT COUNSEL'S

DEFICIENT PERFORMANCE PREJUDICED THE DEFENSE IN HIS OR HER CASE. THE TWO PRONGS OF THIS TEST, DEFICIENT PERFORMANCE AND PREJUDICE, MAY BE ADDRESSED IN EITHER ORDER.

State v. Deckard, 272 Neb. 410, 416 (2006).

XI.

ON A CLAIM OF INSUFFICIENCY OF THE EVIDENCE, AN APPELLATE COURT WILL NOT SET ASIDE A GUILTY VERDICT IN A CRIMINAL CASE WHERE SUCH VERDICT IS SUPPORTED BY RELEVANT EVIDENCE. ONLY WHERE EVIDENCE LACKS SUFFICIENT PROBATIVE VALUE AS A MATTER OF LAW MAY AN APPELLATE COURT SET ASIDE A GUILTY VERDICT AS UNSUPPORTED BY THE EVIDENCE BEYOND A REASONABLE DOUBT.

State v. Delgado, 269 Neb. 141, 690 N.W.2d 787 (2005).

XXII.

THE PROVISIONS OF *NEB. REV. STAT.* § 28-313(3) ARE ONLY MITIGATING CIRCUMSTANCES WHICH MAY REDUCE THE PENALTY FOR KIDNAPPING, AND THE EXISTENCE OR NONEXISTENCE OF THE MITIGATING CIRCUMSTANCES IS A MATTER PROPERLY CONSIDERED BY THE COURT AT SENTENCING, NOT THE JURY.

State v. Becerra, 253 Neb. 653, 573 N.W.2d 397 (1998).

STATEMENT OF FACTS

On November 15, 2003, law enforcement officers in the City of Madison, Nebraska were summoned to 404 East 9th Street in the City of Madison, Nebraska where they found a man, later identified as Pedro Jesus Rayan-Piza ("Jesus") on a porch, gagged, with his feet and hands

bound. (T4; 368:20-24; 369:9-20; 372:6-18). Earlier that same evening, the Madison Police Department received two calls concerning a "suspicious vehicle" at an abandoned house in the 900 block of Quincy Street in Madison, Nebraska. (367:6-19; 368:15-24). Upon questioning by law enforcement, Jesus advised that a male named "Jaime", who was later identified as Jose Louis Trevino ("Trevino"), came to his house on the evening of November 15, 2003. (T4; 419:1-5; 466:15-25). Trevino told Jesus that his car broke down, and asked Jesus if he or his brother could give him a ride to his car and assist him in getting it started. (T4; 387:12-16; 419:1-5; 435:20-24; 466:24-25; 491:5-8). Jesus agreed to give Trevino a ride and drove Trevino to a location in Stanton County, Nebraska. (T4; 420:20-24; 437:20; 467:21; 491:5-8).

Once Trevino and Jesus arrived at that location, Betancourt approached them, allegedly holding a handgun. (T4; 387:12-16; 419:14-15; 436:23-437:8; 488:23-489:9). While in Stanton County, Nebraska, Betancourt and/or Trevino then tied Jesus up with cord and duct tape, and allegedly threatened him. (T4; 437:12-23; 451:11-17). According to the testimony at trial, while at the location in Stanton County, Nebraska, Betancourt kept asking Jesus the whereabouts of his wife, Gabriella Ortiz ("Gabriella"). (T5; 387:12-16; 387:24-388:3; 419:18-19; 437:15-18; 438:7-15; 440:17-24; 470:1-2; 493:1-2; 494:4-5). Betancourt and/or Trevino then placed Jesus in the back of Jesus's car, and the three of them drove back to Madison, at which time Jesus was taken out of the car and put into an old shed which was located on Betancourt's property in Madison, Nebraska. (T4; 378:18-19; 439:11-15; 493:16-20).

Betancourt and Trevino then left Jesus at this shed. (T4; 368:20-24; 369:9-20; 372:6-18; 374:11-13; 411:4-6; 495:12-14). Jesus was not locked in the shed, nor was he tied to anything in the shed. (505:1-8). After Betancourt and Trevino left, Jesus got to his feet and "hopped" to the residence at 404 East 9th Street in Madison, Nebraska, where he was ultimately found by the

residents, Robert and Paula Chadwick. (T5; 386:11-13; 410:20; 444:9-10; 439:20-21; 441:20-22; 443:23-24).

Shortly thereafter, Deputy Ross Bartlett ("Bartlett"), a sergeant with the Madison police department at the time, arrived on the scene. (369:15-16; 408:23). According to testimony at trial, other than appearing to be scared and frightened, Jesus was not physically injured in any way. (372:18; 397:22; 403:22; 404:10-11; 413:12-13; 418:12-15; 423:25; 424:6; 452:1-4).

Law enforcement, with the assistance of a citizen witness, also gathered evidence at the scene, including the duct tape used to bind Jesus. (376:19-377:16; 397:6-12; 413:20-21; 422:14-22). However, this evidence was never tested for Betancourt's fingerprints or DNA. (397:13-19; 423:15-21). At the time of trial, law enforcement did not have these items in their possession and conceded such items were lost. (423:3-4; 425:16-18). Testimony at trial revealed that during the course of their investigation, law enforcement never recovered the alleged gun nor any other weapon claimed to be associated with this kidnapping incident. (424:12-20).

Contrary to Jesus's account, Betancourt testified he was not in the State of Nebraska in November 2003. Betancourt testified he left Madison, Nebraska and moved to Tulsa Oklahoma in February of 2003. (532:5-10). Betancourt returned to Nebraska in April of 2003 for a brief period of time before moving to Kansas to seek employment. (532:13-14). Betancourt left Nebraska for Louisville, Kansas in April of 2003 and stayed there until the end of October of 2003, at which time he did come to Nebraska for a few days. (533:7-22; 534:3-6; 560:5-17). Betancourt again left Nebraska sometime during the first few days of November of 2003 and moved to Houston, Texas. (534:8-13; 560:18-20). Shortly after arriving in Houston, Texas, Betancourt found employment doing concrete work. (534:14-535:15). Betancourt's employment required him to be on the job site every day; and in particular during the month of November,

2003, he did not even have a weekend where he was not required to work. (535:13-18). Betancourt remained in Houston, Texas for approximately six months. (537:21). Betancourt testified he never left the State of Texas and never came to the State of Nebraska during the month of November, 2003. (536:24-537:13; 556:3-557:17). Specifically, Betancourt testified he was not in the State of Nebraska on or about November 15, 2003, when the alleged events occurred. (557:13-16; 557:22-25). On April 24, 2004, Betancourt left Houston and moved to Plano, Texas to live with his girlfriend. (537:22-538:11).

Meanwhile, in Nebraska, the State filed a Motion for Arrest Warrant, and the lower court signed an Order for Arrest Warrant on November 17, 2003, for Betancourt's arrest for the alleged kidnapping of Jesus and use of a firearm to commit a felony. (T3-6). On May 7, 2004, Betancourt was arrested by the Plano, Texas police after being stopped for a traffic violation and was jailed in the Collin County, Texas jail as a result of the Nebraska arrest warrant. (33:21-24; 508:17-23; 538:19-23). This was the first Betancourt learned that Nebraska had issued a warrant for his arrest. (546:19-25). On May 11, 2004, Betancourt signed a Waiver of Extradition Proceedings so that he could be voluntarily returned to the State of Nebraska. (E1; E36; 33:24-25; 545:23-546:18; 548:3-4). Betancourt testified that at the time, he did not know the warrant was for a kidnapping charge, as he could not read English. (572:15-573:6; 573:20-24).

On May 17, 2004, the Madison County Sheriff's office dispatched personnel to Texas to extradite Betancourt back to the State of Nebraska. (34:3-7; 34:17; 547:25-548:4-11). At this same time, after being advised of Betancourt's arrest in Texas and his voluntary surrender to the State of Nebraska, the Madison County Sheriff's office pulled his arrest warrant off the "teletype system" and it no longer showed up as an active warrant. (35:4-7).

On May 17, 2004, due to an "error" by the Collin County sheriff's office, Betancourt's custody was transferred to INS, and he at some later time was deported to Mexico. (E3; 34:9-15; 37:3-4; 508:17-23; 548:7-9; 549:12-16). Because his custody was transferred to INS after he signed the Waiver of Extradition to Nebraska, Betancourt assumed there was no longer a warrant for his arrest in Nebraska. (549:17-24; 571:22-25). It was not until May 25, 2004 that the Madison County Sheriff's office re-entered Betancourt's arrest warrant back into the "teletype system". (35:18; 77:4-81:5).

It is important to note that the record is devoid of any testimony that Nebraska law enforcement made any efforts whatsoever to contact INS on or after May 17, 2004 to determine where Betancourt was being detained in federal custody. Instead, on May 17, 2004, the Madison County Sheriff's office directed the transportation that was en route to Texas to get Betancourt to return to Nebraska, without Betancourt. (E3; 34:9-15; 37:3-4; 508:17-23; 548:7-9; 549:12-16). Betancourt was at some point subsequently deported.

Shortly after being deported, Betancourt returned to Plano, Texas to be with his girlfriend. (550:4-11). While living in Plano, Texas with his girlfriend for almost a decade, Betancourt was employed, and he and his girlfriend had a child together. (550:12-18). Betancourt had absolutely no contact with law enforcement until 2013, and until such time he was unaware of any arrest warrant for him in the State of Nebraska. (550:19-551:1-14).

Almost a decade later, on July 1, 2013, Betancourt was again stopped for a traffic violation in Plano, Texas, and subsequently arrested and held in the Collin County, Texas jail on the arrest warrant from Nebraska. (E3; 508:17-23; 551:2-9). Again, on July 5, 2013, Betancourt signed a Waiver of Extradition, voluntarily surrendering himself to the State of Nebraska. (E3;

E12). At this time, Betancourt was finally extradited to the State of Nebraska. (552:1-553:6; 553:11-19).

On July 23, 2013, Betancourt appeared in the Madison County Court, which granted his request for court appointed counsel and appointed the Madison County Public Defender's ("MCPD") office. (T19). On August 21, 2013, the State filed an Information in the District Court of Madison County, Nebraska charging Betancourt with two counts: (1) Count I, Kidnapping, a Class IA felony; and (2) Count II, Use of a Firearm to Commit a Felony, a Class II felony. (T22). The Information alleged all events occurred on or about November 15, 2003. (T22). On August 23, 2013, Betancourt appeared before the lower court with the MCPD, was arraigned, and entered not guilty pleas to both counts in the Information. (T35-36).

On November 14, 2013, Betancourt filed a Motion for Absolute Discharge, alleging that more than six months had passed since Betancourt's arrest, and the State failed to timely bring him to trial, thereby violating his rights as guaranteed to him by *Neb. Const.* art. 1, §11 and the Sixth and Fourteenth Amendments to the United States Constitution. (T38-39). The lower court heard Betancourt's Motion on November 25, 2013. (T40; 29:2-4; E3). Evidence was adduced by Betancourt and the State, and the lower court took the matter under advisement. (T40; 29:2-4; 30:18-31:1; E1-3). On December 13, 2013, the lower court filed an Order overruling Betancourt's Motion for Absolute Discharge. (T42-48). The MCPD appealed this Order, but subsequently dismissed said appeal before it was heard on its merits by the Nebraska Court of Appeals. The record is unclear of the reason for the dismissal. Betancourt appeared before the lower court for numerous hearings from this time until May 2014, all of which are unrelated to this appeal.

On May 21, 2014, the State filed an Amended Information against Betancourt, adding a third count, Count III, Conspiracy to Commit Kidnapping, a Class II felony. (T54; 49:23-25; 52:6-7; 56:21-25). Again, this Amended Information alleged all events occurred on November 15, 2003. (T54). On this date, the lower court arraigned Betancourt on the Amended Information. (T61-62; 51:2-3; 53:18-54:4). On this date, Betancourt filed a Motion to Quash, alleging that all the events surrounding the three counts as alleged in the Amended Information occurred on or about November 15, 2003. (T60; 50:9). On May 23, 2014, Betancourt requested a continuance of hearing on his Motion to Quash in order to hire private counsel, and the matter was continued to July 25, 2014. (T63; T66; 60:19-20; 61:17; 62:9-12; 63:7-13; 64:1-7).

Sharon E. Joseph ("Joseph") filed an entry of appearance on behalf of Betancourt on May 29, 2014. (T64). The lower court granted the MCPD leave to withdraw on May 30, 2014. (T67). On September 2, 2014, Betancourt appeared with Joseph for the hearing on his Motion to Quash. (T72). Betancourt and the State offered evidence (which will be discussed in detail later), made their respective arguments, and the lower court took the matter under advisement. (T72; 70:1-8; 71:2-73:15; 76:15-16; 77:4-82:17; 84:6-17; 85:7-95:8). On September 19, 2014, the lower court overruled Betancourt's Motion to Quash. (T60, T74-78).

On September 29, 2014, Betancourt appeared before the lower court with Joseph, and entered not guilty pleas to all three counts in the Amended Information filed on May 21, 2014. (T79-80; 98:1-8; 103:22-24; 104:6-15). Trial was then scheduled for October 14, 2014. (108:16; 107:19-20; 109:5).

On March 2, 2015, Betancourt filed a handwritten motion firing Joseph and asked for the MCPD to be reappointed. (T98; 141:24-142:6). On that same date, Joseph filed a Motion to Withdraw and moved to continue Betancourt's trial. (142:7-9; 142:21-23). On March 3, 2015,

the lower court granted Joseph leave to withdraw and reappointed the MCPD's office to represent Betancourt. (T110; 149:5-12). The lower court further scheduled the matter for pretrial conference on March 16, 2015, at which time Betancourt appeared with the MCPD. (T110; T114; 149:8-10; 151:1-8). At this time, the parties advised the lower court they were ready for trial, and the lower court scheduled the matter for jury trial on April 13, 2015. (T114; 158:10-14).

Again, after numerous hearings unrelated to this appeal, the lower court continued the jury trial to commence on August 10, 2015. (T162). This matter then proceeded to jury trial on August 10-12, 2015. (T192-193; 251:1-9). At the close of the State's case in chief and after the State's rebuttal, Betancourt moved for directed verdicts, both of which the lower court overruled. (517:1-6; 585:23-586:7). At the trial's conclusion, the jury found Betancourt guilty on all three counts as alleged in the Amended Information. (T189-191).

On October 23, 2015, despite the MCPD's arguments pertaining to mitigating factors, the lower court sentenced Betancourt to life imprisonment on Count I, Kidnapping, a Class IA felony; to an indeterminate term of not less than ten years nor more than 30 years on Count II, Use of a Firearm to Commit a Felony, a Class II felony; and to an indeterminate term of not less than 30 years nor more than 50 years on Count II, Conspiracy to Commit Kidnapping, a Class II felony. (T202-203; 663:10-665:11; 669:16-670:6). The lower court further ordered that Counts I and III are to be served concurrent to one another, and Count II is to be served consecutive to Counts I and III. (T202-203; 670:6-9). Betancourt was given credit for 828 days previously served. (T203; 670:10-14).

On October 26, 2015, Betancourt timely filed his Notice of Appeal. (See Notice of Appeal in the Court File). This appeal follows.

SUMMARY OF ARGUMENTS

On May 21, 2014, the State filed an Amended Information against Betancourt with allegations based entirely on events occurring on or about November 15, 2003. The Amended Information failed to set forth any allegations, on its face, which would show the statute of limitations as set forth in *Neb. Rev. Stat. § 29-110* was tolled. Betancourt filed a Motion to Quash the Amended Information, which the lower court erroneously overruled.

At trial, the lower court further erred in overruling Betancourt's two motions for a directed verdict. The evidence at both the hearing on the Motion to Quash and at trial was undisputed that Betancourt waived extradition to the State of Nebraska from the State of Texas on May 11, 2004, voluntarily surrendering himself to the State of Nebraska. Due to the Madison County Sheriff's delay of at least six days in sending transportation to get Betancourt and other events beyond Betancourt's control, Texas turned Betancourt's custody over to INS on May 17, 2004. Upon learning this information, Nebraska law enforcement made no attempt to contact INS on or after May 17, 2004, to determine where Betancourt was being detained in federal custody. At some point thereafter, Betancourt was deported to Mexico. It is Betancourt's contention that, based upon the facts of this case, the State failed to meet its burden of showing Betancourt was "fleeing from justice" in order to toll the applicable statute of limitation; and as such, his convictions should be overturned.

Also, on November 14, 2013, the MCPD, Betancourt's attorney at the time, filed a Motion for Absolute Discharge. (T38-39). Again, it is important to note that Betancourt signed a waiver of extradition, voluntarily surrendering himself to the State of Nebraska on May 11, 2004. (T38). It is undisputed from the record that the State failed to bring Betancourt to trial within the time as prescribed by law, thereby violating Betancourt's constitutional and statutory

rights to a speedy trial. On December 13, 2013, the lower court overruled Betancourt's Motion for Absolute Discharge in its entirety. (T42-48). This Order was a final order for purposes of appeal. The MCPD timely filed the appeal of this Order, but then subsequently dismissed said appeal prior to it being heard on its merits. By dismissing said appeal, the MCPD's representation of Betancourt was deficient. And as a result, Betancourt lost his right to appeal the violation of his constitutional and statutory rights to a speedy trial, thereby prejudicing his defense.

Finally, at sentencing, the lower court failed to take into account any mitigating circumstances and erroneously sentenced Betancourt to life imprisonment on Count I, Kidnapping, a Class 1A felony. The record is undisputed that Jesus was "voluntarily released or liberated alive" by Trevino and Betancourt at the time of the alleged incident. The record is further undisputed that Jesus suffered no serious bodily injury during the incident. As such, the lower court erred in sentencing Betancourt to life imprisonment on Count I, Kidnapping, a Class 1A felony.

ARGUMENTS

- I. *The Lower Court Erred In Failing To Quash The Amended Information Filed On May 21, 2014, For The Reason That The Amended Information Showed On Its Face That The Three Year Statute Of Limitations As Prescribed By Neb. Rev. Stat. § 29-110 Barred The State's Prosecution.*

At the outset, it is important to note, as stated by the Nebraska Supreme Court: [T]he construction of [the statutes of limitations] is liberal to the defendant, . . . 'not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it

gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt.” *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951) (citing 1 Wharton, Criminal Procedure (10th ed.) 15, sec. 367). Nebraska law is clear that the burden is on the State to prove all essential elements of the crime charged, including the fact that the charges were filed within the period specified by the applicable statute of limitations. See *State v. Loyd*, 269 Neb. 762, 768, 696 N.W.2d 860, 867 (2005). In the case at bar, Betancourt was charged with three felonies, all of which are subject to a three year statute of limitations as set forth in *Neb. Rev. Stat. § 29-110* (Reissue 2010).

The Nebraska Supreme Court has further stated that “[i]f a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.” *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992). The Court further stated that “[i]f a petition challenged under the statute of limitations, facially shows that a cause of action is barred by the statute of limitations, a plaintiff must allege facts sufficient to avoid the bar of a statute of limitations and, at trial, must prove facts avoiding the statute of limitations.” *Id.*; see also *Taylor v. O’Grady*, 113 F.2d 798 (8th Cir. 1940).

In the case at bar, the Amended Information is clearly based on events that occurred on or about November 15, 2003. (T54). The Amended Information was filed on May 21, 2014. (T54). There is no question that on its face, the Amended Information fails to show any facts which would toll the applicable three year statute of limitations, and as such, is “ostensibly barred by the statute of limitations.” (T54). At no time did the State ask for leave to amend its Amended Information to make such allegations. Consequently, Betancourt filed the appropriate Motion to Quash on May 21, 2014. (T60). On September 2, 2014, Betancourt appeared before

the lower court for the hearing on his Motion to Quash. (T72). Betancourt and the State offered evidence, which consisted of mostly stipulated facts, as will be discussed herein.

In the case at bar, the Amended Information alleged that on or about November 15, 2003, Betancourt allegedly conspired with Trevino to kidnap Jesus, and at some point during their encounter, used a handgun. (T54). The lower court signed an Order for an arrest warrant for Betancourt on November 17, 2003. (T3-6). On May 7, 2004, Plano, Texas police stopped Betancourt for a traffic violation, at which time Betancourt was arrested and jailed in the Collin County, Texas jail as a result of the Nebraska arrest warrant. (33:21-24; 508:17-23; 538:19-23). On May 11, 2004, Betancourt signed a Waiver of Extradition Proceedings, so that he could voluntarily be returned to the State of Nebraska. (E1; E36; 33:24-25; 545:23-546:18; 548:3-4).

On May 17, 2004, the Madison County Sheriff's office dispatched personnel to Texas to extradite Betancourt back to the State of Nebraska, and simultaneously pulled his arrest warrant off the "teletype system." (34:3-7; 34:17; 35:4-7; 547:25-548:11). On that same date, due to an alleged "error" by the Collin County sheriff's office, Betancourt's custody was transferred to INS. (E3; 34:9-15; 37:3-4; 508:17-23; 548:7-9; 549:12-16). There is no evidence in the record of where the INS took Betancourt, or when he was subsequently deported to Mexico. There is also no evidence in the record that Nebraska made any effort whatsoever on or after May 17, 2004, to find out where Betancourt was being detained in federal custody so that he could be returned to Nebraska. It was not until May 25, 2004 that the Madison County Sheriff's office re-entered Betancourt's arrest warrant back into the "teletype system". (34:17-20; 77:4-81:5). Betancourt was at some point thereafter, deported to Mexico.

Sometime after being deported to Mexico, Betancourt returned to Plano, Texas, where he continued to reside with his girlfriend for almost a decade. (550:4-11; 550:12-18). Nine years

later, on July 1, 2013, Betancourt was stopped by the Plano, Texas police as a result of a traffic violation, and he was again arrested and held in the Collin County, Texas jail on the arrest warrant from Madison County, Nebraska. (E3; 508:17-23; 551:2-9). Again, on July 5, 2013, Betancourt signed a Waiver of Extradition, voluntarily surrendering himself to the State of Nebraska. (E12). Betancourt was extradited to Madison County, Nebraska on July 17, 2013. (E3; E12; T10; 552:1-553:6; 553:11-19).

As will be discussed in more detail in Argument II of the Appellant's Brief, this evidence was insufficient to show that Betancourt was fleeing from justice from May 11, 2004 when he voluntarily surrendered his custody to the State of Nebraska until his arrest in Plano, Texas on July 1, 2013. Hence, the State failed to meet its burden, and the lower court erred in overruling Betancourt's Motion to Quash.

II. *The Lower Court Erred In Failing To Direct A Verdict Of Acquittal Where The State Failed To Produce Evidence Sufficient To Sustain A Jury Verdict That Betancourt Was Fleeing From Justice As Set Forth In Neb. Rev. Stat. § 29-110.*

Key to Betancourt's argument is that he waived extradition to the State of Nebraska, voluntarily surrendering himself to Nebraska, on May 11, 2004. (E1; E36). At issue before this Court is whether Betancourt's involuntary transfer to the INS after he signed a Waiver of Extradition, voluntarily surrendering himself to the State of Nebraska, is sufficient to show he was a "person fleeing from justice," thereby tolling the applicable statute of limitations. Betancourt contends he was not fleeing from justice.

While this case is one of first impression in the State of Nebraska, the issue has been touched upon by federal courts. In *United States v. Gonsalves*, 675 F.2d 1050 (9th Cir. 1982), the United States Court of Appeals for the Ninth Circuit held that the limitations period is not tolled

during the time an accused makes a good faith effort to surrender himself to authorities. In so holding, the Court noted that “[a] finding that the accused made a good faith effort to surrender strikes us as inconsistent with a finding that he had the requisite specific intent to flee from justice.... Mindful that criminal limitations statutes are to be ‘liberally interpreted in favor of repose.’” *Gonsalves*, 675 F.2d at 1055 (citing *United States v. Habig*, 390 U.S. 222, 227, 88 S.Ct. 926, 929, 19 L.Ed.2d 1055 (1968), quoting *United States v. Scharton*, 285 U.S. 518, 522, 52 S.Ct. 416, 417, 76 L.Ed. 917 (1932)). In *Gonsalves*, Gonsalves attempted to surrender to authorities through his attorney, but his surrender was delayed due to his attorney’s intervening vacation and trial obligations. 675 F.2d at 1054-1055. The Court concluded that “an accused’s good faith effort to surrender tips the balance on the issue of tolling the statute under § 3290 in favor of the accused’s right to avoid perpetual jeopardy.” *Gonsalves*, 675 F.2d at 1055 (citing *United States v. Di Santillo*, 615 F.2d 128, 135 (3rd Cir. 1980); see also *United States v. Catino*, 735 F.2d 718 (2nd Cir. 1982) (whereby the United States Court of Appeals, Second Circuit, agreed with the above stated principle “that a fugitive who executes a formal and voluntary consent to extradition regains the benefit of the statute of limitations”).

Also, the lack of any attempt by Nebraska law enforcement authorities to follow up on Betancourt’s whereabouts upon being transferred to INS custody on or after May 17, 2004, further lends support to Betancourt’s argument that the State failed to meet its burden to show the statute of limitations was tolled in the case at bar. In *United States v. Sotelo-Salgado*, 201 F.Supp.2d 957 (S.D. Iowa 2002), the United States District Court of the Southern District of Iowa found that it would be “fundamentally unfair and would defy the purpose of both the statute of limitations and the tolling statutes” to allow the government, who knew of the defendant’s crime for over seven years, to do virtually nothing to bring the accused to justice but then attempt

to gain the benefit of the tolling statute because the accused used false names on two occasions. The Court further noted that “[s]tatutes of limitations are statutes of repose ‘designed principally to protect individuals from having to defend themselves against charges supported by facts that are remote in time’” and relied upon the “rule that ‘criminal limitations statutes are to be liberally interpreted in favor of repose.’” *Sotelo-Salgado*, 201 F.Supp.2d at 966. The Court further stated that “[f]airness and the purpose of section 3290 would be undermined if the accused were held responsible for delays which are attributable to the actions, or more accurately, the inaction of law enforcement.” *Id.* at 965.

In *State v. Bobo*, 872 So.2d 1052 (La. 2004), Bobo was incarcerated in the State of Texas and had pending legal matters in the State of Louisiana. Upon learning of Bobo’s incarceration in Texas, Louisiana obtained a warrant of extradition signed by the Texas governor. *Bobo*, 872 So.2d at 1058. It would appear from the record, there was a breakdown of some sort in the communications between the Texas and Louisiana authorities, and Louisiana failed extradite Bobo and bring him to trial within two years from the date of his indictment as required by Louisiana law. *Id.* at 1053-1054. The Louisiana Supreme Court found the lower court erred in overruling Bobo’s motion to quash and held that because the Texas authorities properly executed the extradition papers for Bobo’s return to Louisiana, the State of Louisiana failed to meet its burden of proving that the applicable prescriptive period was tolled. *Id.* at 1054. In so ruling, the Louisiana Supreme Court noted that the “statutory periods of limitation on the prosecution of cases offer the primary means of enforcing the Sixth Amendment right to a speedy trial ‘beyond which there is an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.’” *Id.* at 1059 (citing *United States v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)); see also *Emery v. State*, 138 Neb. 776, 295 N.W. 417 (1940) (finding the

failure to arrest the accused due to the negligence of law enforcement holding the warrant and not anything the accused did was not sufficient to toll the statute of limitations)).

In the case at bar, Betancourt waived extradition to Nebraska on May 11, 2004, whereby he voluntarily surrendered to the State of Nebraska. (E1; E36; 33:24-25; 545:23-546:18; 548:3-4). The Madison County Sheriff's office only arranged for a transportation agency to go to Plano, Texas to get Betancourt on May 17, 2004. (34:3-7; 34:17; 547:24-548:11). This was six days after Betancourt had waived extradition to the State of Nebraska. On or about May 11, 2004, the Madison County Sheriff's office pulled Betancourt's arrest warrant off the "teletype system". (35:4-7). On May 17, 2004, the Plano police department transferred Betancourt's custody to INS, and he was involuntarily detained by INS. (E3; 34:9-15; 37:3-4; 508:17-23; 548:7-9; 549:12-16). It is clear from the record that the Madison County sheriff's department made no attempt to contact INS on or after May 17, 2004 to locate where Betancourt was being detained in federal custody. Instead, on that same date, the Madison County Sheriff's office directed their transportation company that was en route to Texas to return to Nebraska, without Betancourt.

Nebraska's lack of any further action resulted in Betancourt subsequently being deported. The efforts made by the Madison County Sheriff's office to bring Betancourt back to the State of Nebraska after he waived extradition, can be described as minimal efforts, at best. As stated by the Louisiana Supreme Court, the purpose for the statute of limitations in criminal cases is the primary means of enforcing Betancourt's Sixth Amendment right to a speedy trial, "beyond which there is an irrebuttable presumption" that Betancourt's right to a fair trial would be prejudiced. This is precisely the result in the case at bar—law enforcement admittedly lost crucial evidence and witnesses could no longer be found. This cannot satisfy the State's burden

to show, beyond a reasonable doubt, that Betancourt was “fleeing from justice,” thereby tolling the applicable statute of limitations.

Furthermore, these facts show that Betancourt made a good faith effort to surrender himself to the State of Nebraska on May 11, 2004, when he signed a Waiver of Extradition. (E1; E36; 33:21-24; 508:17-23; 538:19-23). That he did so is inconsistent with any finding that he had the requisite intent to “flee from justice,” as argued by the State. Betancourt’s good faith effort to surrender himself to the State of Nebraska by waiving extradition “tips the balance of the issue of tolling” under *Neb. Rev. Stat. § 29-110* in favor of Betancourt’s “right to avoid perpetual jeopardy.” To find the State met its burden on the facts of this case violates the very essence behind statutes of limitations in criminal cases.

Based upon the above and foregoing, the lower court erred in overruling Betancourt’s motions for directed verdicts at the close of the State’s case in chief and after the State’s rebuttal. Accordingly, his conviction must be overturned.

III. *At Trial, Betancourt Received Ineffective Assistance Of Counsel For The Reason That His Trial Counsel Dismissed His Appeal Of The Lower Court’s Ruling On His Motion For Absolute Discharge, Thereby Waiving His Right To Challenge Counts I And II On Speedy Trial Grounds.*

Again, on November 14, 2013, Betancourt’s attorney filed a Motion for Absolute Discharge, arguing that the State failed to bring Betancourt to trial within six months of the filing of the State’s complaint, thereby violating his right to a speedy trial as guaranteed to him by *Neb. Rev. Stat. § 29-1207* and *29-1208*, *Neb. Const. art. I, §11*, and the Sixth and Fourteenth Amendments to the Constitution of the United States. (T38-39). On December 13, 2013, the lower court overruled Betancourt’s Motion for Absolute Discharge in its entirety. (T42-48).

This Order was a final order for purposes of appeal. See *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

The MCPD timely filed the appeal of this Order, but then subsequently dismissed said appeal prior to it being heard on its merits by the Nebraska Court of Appeals. See *State v. Rosario Betancourt-Garcia*, Case No. A-14-4, filed in the Nebraska Court of Appeals. The facts of the case at bar show the presence of speedy trial issues. Because of the MCPD's dismissing said appeal, the MCPD's representation of Betancourt was deficient. Consequently, because of Betancourt's ineffective representation at trial, he lost his right to appeal the violations of his right to a speedy trial, thereby prejudicing his defense.

IV. Appellant's trial counsel provided ineffective assistance of counsel in failing to investigate, develop and present exculpatory evidence and testimony at trial in support of the Defendant's alibi defense.

Trial counsel failed to adequately investigate information provided to them by the Defendant relating to witnesses with knowledge of the Defendant's whereabouts in November of 2003. Specifically, the Defendant provided names, addresses and phone numbers of individuals to be contacted and brought forward to testify on behalf of the Defendant at trial to support the Defendant's claim of non-presence in State of Nebraska at the time of the crime. The Defendant provided trial counsel Sharon Joseph and the Madison County Public Defender's Office with witness information and whereabouts.

The Madison County Public Defender's Office, trial counsel, failed to take all necessary steps in preparation to ensure the presence of witnesses and testimony in support of Defendant's alibi claim. The failure to secure presence and testimony of alibi witnesses at the jury trial denied

the Defendant a right to effective assistance of counsel under the 6th Amendment of the United States Constitution and Art. 1, §11 of the Neb. Const.

“In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the Defendant has the burden first to show that counsel’s performance was deficient; that is, counsel’s performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the Defendant must show that counsel’s deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.” *State v. Deckard*, 272 Neb. 410, 416 (2006).

V. *The Lower Court Erred In Failing To Take Into Account Any Mitigating Circumstances And Sentencing Betancourt To Life Imprisonment on Count I, Kidnapping, A Class IA Felony, Rather Than To A Term Of Years.*

In pertinent part, *Neb. Rev. Stat. § 28-313(3)* provides, “If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.” At trial, after the alleged kidnapping, Betancourt and/or Trevino drove Jesus back to Madison, Nebraska at which time they took Jesus out of the car and put him into an old shed located on Betancourt’s property. (T4; 378:18-19; 439:11-15; 493:16-20). Betancourt and Trevino then left Jesus at this shed, physically unharmed. (T4; 368:20-24; 369:9-20; 372:6-18; 374:11-13; 411:4-6; 495:12-14). Jesus was not locked in the shed when Betancourt and Trevino left him there, nor was he bound to anything in the shed. (505:1-8). It is undisputed that after Betancourt and Trevino left, Jesus got to a residence located at 404 East 9th Street in Madison, Nebraska, where he was ultimately found, scared but physically unharmed, by the residents. (T5; 386:11-13; 410:20; 444:9-10;

439:20-21; 441:19-22; 443:22-24). Other than appearing to be scared and frightened, Jesus was not physically injured in any way. (372:18; 397:22; 403:22; 404:10-11; 413:12-13; 418:12-15; 423:25; 424:6; 452:1-4).

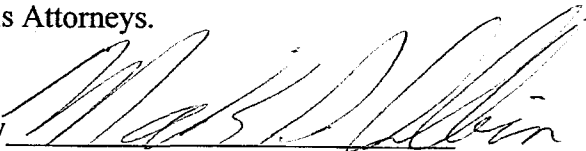
Because the evidence at trial showed that Jesus was voluntarily released, alive, by Betancourt and/or Trevino, in a safe place without having suffered any bodily injury whatsoever prior to trial, the mitigating factors set forth in *Neb. Rev. Stat. § 28-313(3)* were satisfied. As such, Betancourt should have been found guilty of a Class II felony and accordingly sentenced to a term of years. In failing to find that the mitigating factors as set forth in *Neb. Rev. Stat. § 28-313(3)* had been satisfied, the lower court's sentence of Betancourt to life imprisonment constitutes an excessive sentence. And as such, Betancourt's conviction must be reversed and the matter remanded accordingly.

CONCLUSION

Based upon the above and foregoing, Rosario Betancourt-Garcia, the Appellant, respectfully requests this Court reverse the lower court's rulings, and set aside his convictions, and remand accordingly.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on the 21ST day of April, 2016, a copy of the Brief of Appellant in the above entitled case was served upon the Appellee by mailing the same by United States mail, postage prepaid, duly addressed to the following:

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